

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

IN RE: . Case No. 03-26565
. .
. .
JAZZ PHOTO CORP., .
. 50 Walnut Street
. Newark, New Jersey 07102
Debtor, .
. April 11, 2005
. 1:41 p.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE MORRIS STERN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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& Leonard, P.A.
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For Charles Forman,
Chapter 7 Trustee for
Jack Benun: Forman Holt & Eliades LLC
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1 THE COURT: The scheduled matter will be heard and
2 fully considered. This is Jazz Photo. Appearances, please.

3 MR. SIROTA: Good afternoon, Judge. Michael Sirota
4 and Jeff Kaplan, Cole, Schotz, Meisel, Forman, and Leonard, on
5 behalf of Jazz Photo.

6 MR. GREENBERG: Good afternoon, Your Honor. Howard
7 S. Greenberg, Ravin Greenberg, appearing for the Jazz
8 Committee.

9 MS. JUROW: Margaret Jurow for the United States
10 Trustee.

11 MR. SCHWARTZ: Good afternoon, Your Honor. Joseph
12 Schwartz, Riker, Danzig, Scherer, Hyland, and Perretti on
13 behalf of Jack Benun.

14 MR. ROSENTHAL: Good afternoon, Your Honor. Lawrence
15 Rosenthal of Stroock, Stroock, and Lavan for Fuji.

16 MR. BUECHLER: Bruce Buechler and Michael Etkin from
17 Lowenstein Sandler, co-counsel for Fuji Photo Film Co.

18 MR. HOLT: Good afternoon, Your Honor. Michael Holt,
19 Forman, Holt, and Eliades, on behalf of Charles Forman, Chapter
20 7 Trustee for Jack Benun.

21 THE COURT: All right. We have three matters.
22 Bullet 818 authorizing a motion which would authorize debtor's
23 payment to Mr. Benun, the funds held in debtor's reserve
24 account. I'll hear that first. Mr. Schwartz, it's your
25 motion.

1 MR. SCHWARTZ: Thank you, Your Honor. As Your Honor
2 may recall, at the time that Jazz filed its bankruptcy case
3 JCB, which is an S corporation whose stock is owned by Mr.
4 Benun, had a contract with Jazz, and pursuant to that contract
5 JCB was entitled to the sum of \$15,000 per week as
6 compensation, was entitled to 25 percent of the settlement of
7 the Imation proceeds if and when a settlement was effectuated,
8 and certain other commissions. During the Jazz case Fuji filed
9 a motion seeking a determination from the Court that JCB was a
10 professional person under 327 of the Bankruptcy Code and
11 seeking a discouragement of funds that JCB had received up
12 until that point. Around this time the U.S. Trustee also asked
13 Mr. Benun to step down as a consultant and instead become a
14 fiduciary, which Mr. Benun agreed to do, and Mr. Benun in July
15 of 2003 became an officer and a director of Jazz, the debtor.

16 At around that time, in response to the Fuji motion,
17 Jazz filed a cross motion seeking an order rejecting the JCB
18 agreement. During this time period negotiations went underway,
19 and one of Mr. Benun's primary concerns was that he wanted to
20 shepherd the process of the Imation litigation. He wanted to
21 be in control of it. He wanted to make sure that it wasn't
22 settled out from under him at some amount that he believed was
23 unsatisfactory, and so as a result, he negotiated a deal which
24 at the return date on the Fuji motion and the Jazz cross motion
25 was effectuated, and that settlement called for the JCB claim

1 -- the 25 percent of the Imation proceeds -- to be subordinated
2 only if a trustee for Jazz weren't appointed. And the reason
3 for that again was so that Mr. Benun can stay in control of the
4 Imation litigation and not a trustee, and Mr. Benun also agreed
5 to reduce his weekly salary from the \$15,000 per week that he
6 was getting at JCB to \$12,500 pursuant to him becoming an
7 officer and director of Jazz. At the return --

8 THE COURT: Subordination -- just remind me. My
9 recollection is the subordination was effective unless there
10 was a conversion.

11 MR. SCHWARTZ: It was effective unless there were a
12 trustee appointed I believe. I believe that it was the
13 appointment of a trustee.

14 UNIDENTIFIED ATTORNEY: Your Honor, it's my best
15 recollection that it was a combination. It was a Chapter 11
16 Trustee or a conversion.

17 MR. SCHWARTZ: I believe that --

18 THE COURT: Is it both? Do I have --

19 UNIDENTIFIED ATTORNEY: I believe so, Judge.

20 THE COURT: All right. Thank you. Thanks.

21 MR. SCHWARTZ: Thank you, Your Honor. So at the
22 hearing on July 30th with this settlement essentially in place,
23 the parties came before Your Honor, and Your Honor expressed
24 concern at that point, because at that point Jazz had been
25 touting that its exit from Chapter 11 was tied to either a

1 successful outcome with respect to the Imation litigation or a
2 successful appeal with respect to the Fuji judgment. And, Your
3 Honor, expressing concerns that this case might go down the
4 tubes and go the route of conversion said very clearly on the
5 record that we had -- we needed to protect against the
6 downside. That in the event a trustee is appointed, and this
7 case is administratively insolvent, there needs to be a burial
8 fund. So Your Honor directed that out of the \$12,500 that Mr.
9 Benun had agreed to receive, 5,000 would be placed into an
10 escrow account -- a trust account to protect against that
11 downside, and Your Honor then said that Mr. Benun can apply for
12 those funds at some point when there's visibility in the case.

13 As everyone is aware, at some point down the road the
14 Fuji judgment was not overturned on appeal, and, in fact, the
15 Federal Circuit affirmed the District Court's entry of that
16 judgment -- issuance of that judgment. And then we got to the
17 Imation trial. The trial started, and ultimately it was
18 settled out from under Mr. Benun objected to the settlement.
19 The Creditors Committee moved it. Your Honor knows all about
20 that. And oh, by the way, I don't know if Your Honor saw it
21 this morning, the District Court denied the Trustee's
22 application for a stay pending appeal with respect to that
23 appeal, and I think that at this point, unless the Trustee
24 decides to seek a stay pending appeal from the Third Circuit,
25 the settlement will go effective, and the plan will go into

1 effect assuming that confirmation occurs, etcetera.

2 But be that as it may, the Imation settlement calls
3 for \$25 million to be paid into the Jazz estate, and by all
4 best calculations, the total amount of secured and
5 administrative claims in the Jazz estate is significantly less
6 than that. It's somewhere between 10 and 18 million dollars
7 depending on whether the ITC claim is pending, on whether the
8 Fuji claims are entitled to administrative priority status.
9 And so at this point it looks like \$25 million, which is
10 sitting in Mr. Sirota's trust account, is going to be disbursed
11 out to creditors. Creditors -- unsecured creditors will
12 receive a substantial distribution. Granted, there is a large
13 Fuji judgment out there, and there are significant amounts of
14 unsecured claims. But nevertheless, there's a lot of money
15 left over after the payment of unsecured -- after the payment
16 of priority claims, secured claims, etcetera, to get down and
17 pay unsecured creditors.

18 There's also the bond proceeds that are sitting -- I
19 don't recall how much is there, but it's a couple hundred
20 thousand dollars. There's also the other assets of Jazz that I
21 believe are subject to another motion for sale which is coming
22 up in the next couple of weeks which seeks to bring somewhere
23 in the neighborhood of \$900,000 into the estate. And so when
24 all is said, it appears that at this point unsecured creditors
25 are going to receive a significant distribution. Again, given

1 the amount of unsecured claims in the estate, it might not be a
2 very meaningful distribution, but nevertheless, I think
3 unsecured creditors, pursuant to the Fuji kicking in of the
4 million dollars, are going to get a significant distribution.
5 I think it's somewhere around 20 percent on the dollar.

6 I guess, first of all, at this point it's Mr. Benun's
7 position that by virtue of the fact that an examiner was
8 appointed and Capstone which was the examiner and is now
9 shepherding the liquidating process, as well as the fact that
10 the Creditors Committee moved the settlement out from under Mr.
11 Benun, a de facto trustee has, in fact, been appointed for
12 Jazz. Granted, there has not been the appointment of a
13 trustee, but nevertheless, it's Mr. Benun's belief and his
14 position that de facto there has been a trustee appointed, and
15 so the JCB claim shouldn't be subordinated. But that's not for
16 determination today, obviously, but nevertheless, JCB believes
17 that it should share in those proceeds from the Imation
18 settlement.

19 Now let me get back to this motion, and this motion
20 is to -- Mr. Benun's wants a turnover of the funds that are in
21 the Jazz account -- burial fund -- and he's been placing --
22 Jazz has been placing \$5,000 per week, and there's something
23 like \$400,000 that's sitting in that account that Mr. Benun
24 believes that he is entitled to, and we seek this motion -- we
25 file this motion solely to allow Mr. Benun to pay his court-

1 appointed professionals not to allow Mr. Benun to see those
2 funds himself. Mr. Benun's professionals in his case have
3 accrued administrative expense claims that total somewhere in
4 the neighborhood of \$600,000 plus for which at this point it
5 doesn't appear that those claims are going to get paid.
6 There's other assets in the estate, and the Trustee is pursuing
7 those assets, but we don't know whether there's going to be any
8 distribution that's going to be available for administrative
9 creditors in Mr. Benun's case.

10 Now there's been three responses that have been filed
11 to this motion. The first was filed by the debtor, Jazz, and
12 essentially Jazz argues that those funds that were withheld
13 from Mr. Benun's pay were reserved for the debtor's use if the
14 debtor's case does not result in a successful reorganization.
15 That the case is not concluding with a, quote, happy ending.
16 Things did not turn out, quote, bright and rosey, and there was
17 no, quote, pot of gold produced by the Imation litigation.

18 However, Your Honor, I don't believe that that was
19 what Your Honor had in mind when you directed that the burial
20 fund be established. Again, if you read the transcript -- and
21 I -- obviously, I can only read the transcript. I was not
22 here. Mr. O'Grady from my office was here, and I don't know
23 that anybody can get into Your Honor's head, but I think that
24 Your Honor -- what Your Honor meant was that if Jazz -- if the
25 case went down the tubes, if Imation didn't hit, if the appeal

1 of the Fuji judgment were not overturned, and there's no money
2 available to pay anybody, then you wanted some money to pay the
3 Trustee if the case were converted, etcetera, and so you wanted
4 some money held aside for administrative costs. And there was
5 no talk about a happy ending, a bright and rosey
6 reorganization, etcetera. It was that administrative expense
7 claims would get paid, and they are getting paid. And so I
8 believe that the debtor's objection is belied by the terms of
9 -- by the -- what's reflected on the record at the July 30th,
10 2003 hearing.

11 Now, Fuji also files an objection, and Fuji says --
12 essentially they use it as another opportunity to -- for
13 various -- ad hominem attacks on Mr. Benun, and they argue that
14 Mr. Benun breached his fiduciary duties all during the case
15 because it was the determination that Jazz was infringing on
16 Fuji's patents, that Benun's actions in shepherding the debtor
17 post-petition harmed creditors, and that Benun didn't produce
18 any tangible benefit to the debtor's estate at all. And they
19 also argue that Mr. Benun has personal assets sufficient to pay
20 his own administrative claims.

21 Your Honor, again, first of all, Mr. Benun
22 voluntarily agreed to reduce his compensation from the 15,000
23 per week down to 12 five per week. Mr. Benun agreed as part
24 and parcel of this to subordinate the JCB claim in the event
25 that there was not a Trustee appointed for Jazz. Mr. Benun at

1 that point could've resigned back in July of '03, but instead
2 he -- he could've made more money elsewhere. Instead he stayed
3 on simply to shepherd the Imation process and make sure that
4 Jazz continued to function and operate and hopefully
5 reorganize.

6 And so when you look at the whole picture here, I
7 don't think that you can that Mr. Benun's actions harmed
8 creditors, and whether you want to say they harmed creditors
9 because there's been a finding that Jazz infringed post-
10 petition or not, again the purpose of the reserve account --
11 and that's all that we could really look at, because that's
12 what Your Honor directed at the July 30th, 2003 hearing. The
13 purpose of that account was to make sure that Jazz's case was
14 not administratively insolvent. Quite frankly, it's not, and
15 so we ask that those funds be turned over to Mr. Benun, so that
16 his estate which appears to be administratively insolvent can
17 be paid.

18 The Chapter 7 Trustee -- I'm asking --

19 THE COURT: You don't want the same relief that Mr.
20 Holt is asking for.

21 MR. SCHWARTZ: I was going to get to Mr. Holt. Mr.
22 Holt files a response not an objection. He says we agree, turn
23 the money over, because the money should come over to the
24 Trustee, and the Trustee should use it and pay expenses
25 according to their priority. What I would suggest is that the

1 money be turned over, and that we -- everybody reserve all
2 rights as to those monies. Obviously, I'd rather see the money
3 come over than not come over, and so if the money comes over
4 and goes into Mr. Holt's account, and he gets to use the money
5 for whatever purpose he deems necessary -- the Trustee that is
6 -- in the Chapter 7, then I'll have to live with that. But the
7 bottom line is that the money should be turned over. We
8 believe that the money constitutes the post-petition earnings,
9 and Mr. Benun is not property of his estate if directs it to
10 come over, and he could use those monies to pay his
11 professionals. But be that as it may, the money should be
12 turned over. The purpose of the burial fund has been
13 fulfilled.

14 THE COURT: I think you've made as much of your
15 argument as you can including arguing the record, and I
16 appreciate that. There are certain assumptions in your
17 argument that again you wouldn't necessarily know, because your
18 point about not getting into the Judge's head is correct. But
19 one is that the step down from initially \$15,000 to \$12,500 and
20 eventually to 75 hundred dollars was in part a function of the
21 offering of Mr. Benun, but in reality it didn't matter what he
22 offered, because he wasn't going to get \$15,000, nor was JCB
23 under any circumstances at all. It was excess compensation,
24 over compensation under the circumstances, and that was never
25 going to happen, and it didn't matter whether there was

1 agreement or disagreement. Now, again, in fairness to you, you
2 wouldn't know that, but certainly I knew that.

3 And so when the offer came in at \$12,500, I wasn't
4 going to allow that, and I thought 75 hundred was more than
5 gracious under the circumstances. And in analyzing the pluses
6 and minuses in the estate, you're right that my first concern
7 was that there be zero dollars left for burial expenses, but
8 what happened over the period of time since the account was
9 established for reservation purposes was that there were
10 minuses as well as pluses. The obvious plus is the \$25
11 million, but the minuses are a function of what happened with
12 the ITC on the continuing issue. Now that's not fully attended
13 to as we'll hear later when we deal with the issue of retention
14 for accounts on appeal.

15 But you've got Fuji's administrative claim that
16 piggybacks to some extent on that determination, and an
17 enormous amount of expense in the interim. And I don't see --
18 though you cast it this way, and I don't blame you, but I don't
19 see Mr. Benun as providing heroic efforts of a selfless nature.
20 I mean he was the one with the most to win or lose here, and
21 his staying with the Imation litigation on the balance of
22 matters in this administration was to protect his own
23 interests. I don't say that as a negative form, but it's
24 certainly not positive. I mean it is what it is, and he was
25 there to protect his own interests. So I don't think he ever

1 was going to get the 15. He was never going to get 12 five,
2 unless there was a tremendous result. What is the result? I
3 think you're over reading -- and I read this transcript again
4 to make sure that I wasn't recasting history. I read it in
5 several places, including the point in time when I denied the
6 application for Mr. Benun's access to the account on an interim
7 basis, and it's as between Mr. Benun, if you will -- and I
8 understand that Mr. Holt has a legitimate fiduciary concern as
9 between Mr. Benun and the rest of all creditors. It seems to
10 me that Mr. Benun's entitlement is on the short side of that
11 balance.

12 But having said that, I'm willing to hear more. Let
13 me hear from first the debtor to see the debtor's view of your
14 position and then Fuji and Mr. Holt.

15 MR. SCHWARTZ: I'm sorry.

16 THE COURT: Go ahead.

17 MR. SCHWARTZ: If I could just say one thing in
18 response to one comment Your Honor made?

19 THE COURT: Go ahead.

20 MR. SCHWARTZ: I don't disagree with Your Honor in
21 that Mr. Benun acted in pursuit of his own interests in staying
22 on with Jazz, but at the same time had he left Jazz to make
23 more money elsewhere, Mr. Frazza's firm would've stayed on, and
24 I think that's been made clear by the record throughout. His
25 firm would've stay on and prosecuted the Imation litigation,

1 and whether it was someone else who shepherded the process at
2 Jazz or whether there was a Chapter 11 Trustee appointed or
3 whatever, the bottom line is that I think we would've gotten to
4 the point we would've gotten to anyway, and so to say that Mr.
5 Benun stayed on simply to further his own interests I think is
6 a little bit illogical to an, because I --

7 THE COURT: Well if he didn't stay on, we wouldn't be
8 here arguing over the reserve account I assume.

9 MR. SCHWARTZ: That's true, but I think if he
10 wouldn't have stayed on, then he -- there would be no reserve
11 account, and presumably, he might have made more money
12 elsewhere and been able to pay my firm and paid the Amper
13 Politziner firm, etcetera, and we would've probably gotten to
14 the 25 million in any event. Mr. Benun was the person who
15 shepherded that process. And again I know Your Honor said that
16 that's one of the positives, and, in fact, it is, because if it
17 wasn't for Mr. Benun, we would've never gotten to that point.

18 THE COURT: What year -- you know, again there's
19 quite an assumption there that Mr. Benun would've made more
20 money elsewhere. Would he have made more money in a way that
21 wouldn't be subject to either an injunction, which I assume is
22 now being sought, or otherwise infringement? I don't know. I
23 mean and who knows? That's a pretty speculative matter as to
24 whether he would've made more money elsewhere, but short of
25 starting up another business and maybe he would have, which

1 would've been an interesting turn of events, 75 hundred dollars
2 a week was not chicken feed for Mr. Benun, and he got it every
3 week. Mr. Benun was well compensated for what he did. Whether
4 he was too well compensated might be an issue, but it isn't at
5 this time. No one's made that argument, but having said that,
6 let me hear from rest of the people.

7 MR. SCHWARTZ: Thank you, Your Honor.

8 MR. SIROTA: If the Court please, Judge, my
9 recollection and a reading of the record -- I may not have the
10 answer as to exactly what Your Honor intended with respect to
11 the burial fund, but I do know this. Nowhere in the record was
12 there an insurance policy issued for anyone in the Benun
13 estate. It was clearly directed towards a protection afforded
14 to the Jazz estate, and Mr. Benun has filed claims against this
15 estate, an administrative claim, an unsecured claim, and I
16 suspect during this process those claims will get fully aired
17 out and argued to the extent they can't be resolved. So that
18 the Benun-Jazz debate is still ongoing, and we see no reason or
19 authority for taking money that belongs to the creditors of
20 Jazz and moving it to the Benun estate. We don't see any
21 authority in the record. We don't see any authority in the
22 law, and Mr. Schwartz has foreshadowed this potential argument
23 that somehow there's yet an additional claim, and that may stem
24 from this de facto trustee argument.

25 My only point, Judge, is I guess we're in here more
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1 about Mr. Benun's claims in this estate. There's no reason to
2 take what was designed to fund a wind down, call it what you
3 will, whether it's a trustee or otherwise, and move those
4 dollars to the other side of the ledger when those dollars
5 belong to the Jazz creditors.

6 MR. BUECHLER: Good afternoon, Your Honor. On behalf
7 of Fuji we clearly oppose the motion. As Mr. Schwartz pointed
8 out and Your Honor noted, from our perspective there is no
9 question that Mr. Benun was more than handsomely compensated at
10 75 hundred dollars per week. Mr. Schwartz made the argument it
11 would seem to him that way that somehow the delta between the
12 75 hundred and maybe the 15,000 was whole property of the Benun
13 estate, and from my attendance at the hearing on July 30, 2003
14 and the record there is no hint that he has any property right
15 entitlement to anything above the 75 hundred dollars that was
16 paid and authorized and set forth in the form of compensation
17 in the Court's order dated June 22, 2003 that fixed the gross
18 compensation of Mr. Benun going forward at 75 hundred dollars a
19 week plus the car allowance.

20 Mr. Benun, from our perspective, has wreaked havoc
21 to this case and wreaked havoc upon Fuji by virtue of the
22 infringement both pre- and post-petition. From our
23 perspective, if Mr. Benun would've walked away from Jazz Photo
24 in June or July of 2003, that would've been fine. He didn't,
25 but he was paid for it. He has no property right entitlement

1 or any argument today that the burial funds which were for the
2 Jazz case should somehow be utilized to pay his claims in the
3 Benun estate. There's no entitlement that that administrative
4 claim should get paid ahead of the administrative claims
5 including Fuji's entitlement to assert an administrative claim
6 for the post-petition infringement which at this point in time
7 has not yet been adjudicated by Your Honor.

8 More importantly, to date the accrued fees on the
9 Jazz side post-petition -- all of the professionals retained
10 just on the Jazz exceeds \$10 million. That includes somebody
11 from Budd Lerner, Mr. Greenberg's firm, Mr. Sirota's firm,
12 Neville Peterson, Mr. Kaplan, the accountants, and the host of
13 professionals. Ten million dollars. This was not a mega case.
14 To now say that the Jazz estate when creditors -- and honestly,
15 Mr. Schwartz says the unsecured creditors and Jazz will get 20
16 percent. We wonder whether he's going to guarantee that,
17 because on our calculation of the map we don't see the
18 unsecured creditors on the Jazz side getting 20 cents on the
19 dollar let alone allowing the Benun professionals to be paid
20 for their fees ahead of the unsecured creditors or
21 administrative creditors on the Jazz side.

22 There are assets in the Benun case. The Trustee,
23 through the efforts of the his counsel, filed two lawsuits last
24 week and will attempt to recover those assets. They should
25 stand on line like all creditors on the Benun side, like Fuji

1 will stand as a creditor on the Benun side, and likewise,
2 there's no entitlement, in our view, for the Trustee in the
3 Benun case to bootstrap onto the arguments made by Mr. Benun's
4 counsel that the money being sought from the burial fund in the
5 Jazz case should be paid over to the Benun estate at this point
6 in time. There's just no factual showing, no legal showing.

7 While it turns out, because of the settlement of the
8 Imation case, that there's a likelihood administrative claims
9 on the Jazz side will be paid in full because of the \$25
10 million, it doesn't automatically mean the burial fund goes to
11 the Benun case. That's best case. The motion is still
12 premature. Best case. Candidly, from our perspective, the
13 Court should deny it and not even allow Mr. Benun's counsel to
14 seek to re-file as Your Honor did in May of last year when they
15 brought on a similar motion for an interim determination at
16 that point in time. There's no basis for this relief. There's
17 no basis for the entitlement. We don't need to repeat what's
18 said in our papers. We think we point to fact. It's already
19 been proven in our perspective that Mr. Benun breached is
20 fiduciary duties. He cost this estate a tremendous amount of
21 money.

22 And with regard to the heroic efforts, as Your Honor
23 pointed out, there's not even a showing that Mr. benun was the
24 crucial party or witness or player that brought around --
25 brought about the result of the settlement of the Imation case

1 at \$25 million, and from what we know that unfolded in this
2 bankruptcy courtroom Mr. Benun didn't bring that settlement
3 about, because he opposed it. He hired new counsel to come in
4 at the last minute to try and throw every monkeywrench into
5 that settlement that he could -- serve deposition notices, seek
6 to get documents which Your Honor quashed. All in an effort to
7 upset that settlement so that \$25 million wouldn't be available
8 for the creditors of Jazz, and for that they seek additional
9 monies. Too little, too late. We request that the Court deny
10 it outright. Unless has any questions, we'll rest on this and
11 our papers.

12 THE COURT: Mr. Holt.

13 MR. HOLT: Judge, I won't belabor the record. As you
14 noticed --

15 THE COURT: You were the one I wanted to hear from.

16 UNIDENTIFIED ATTORNEY: I'm not sure what we say.

17 MR. HOLT: I think the issue becomes -- Judge, it's a
18 uniquely factual circumstance that we have here, and the
19 Trustee was not present. I'm the Johnny Come Lately in the
20 group. My position is -- and we put this in our papers I
21 think. As Mr. Buechler just indicated, Jack Benun's
22 compensation was fixed at the 75 hundred dollars, and Your
23 Honor felt that it would be appropriate to have this reserve
24 created, and as I indicated, I wasn't here, and I could only
25 give you the transcript.

1 However, to the extent that Mr. Benun retains some
2 residual interest in that reserve account, it's our position
3 that it's not his post-petition earnings. His compensation was
4 fixed at the 75 hundred dollars, and that reserve account
5 specifically -- actually, I believe it specifically remains
6 property of the Jazz estate absent further order of the Court.

7 We're in a position right now in the Jack Benun
8 Chapter 7 case where we have, in fact, instituted litigation
9 against various family members and related entities to afford
10 certain transfers the nature of which have been brought before
11 the Court on various occasions. We'll see whether they're
12 successful or not.

13 By way of background, and just so we're all on the
14 same page, we intend to initiate proceedings to sell Mr.
15 Benun's residence, whether it be -- we're going to initiate an
16 adversary proceeding to sell that residence free and clear of
17 his wife's interest pursuant to Section 363(h) of the
18 Bankruptcy Code. Just by way of background, the tax assessed
19 value for the year 2005 for that property, exclusive of any
20 contiguous properties that may -- that are owned by family
21 members that, you know, may or may not be subject to avoidance
22 actions by the Trustee, is about \$3.15 million. Mr. Benun pre-
23 petition had submitted a financial statement to the District
24 Court in February of 2003 which had valued his one half
25 interest in that property at that time at \$2.5 million. It's

1 not clear from the reading of the opinion in that matter
2 whether that was his net equity in the property or not, but
3 anyway, it looks like -- for the sake of candor for the Court
4 it looks like that there is a source of recovery from if not
5 just the avoidance actions then from the debtor's interest or
6 debtor and his spouse's interest in the debtor's residence.

7 That being said, the Benun estate -- at this time I
8 believe that the Chapter 11 administrative professional fees
9 are somewhere in the nature of \$600,000 or more that remain
10 unpaid. Whether the avoidance actions ultimately prove to be
11 beneficial to the estate, I don't know. I do know that we find
12 ourselves in a position which I find somewhat ironic given Your
13 Honor's -- at least what I saw in the transcript -- concern
14 about the fact that the Jazz case might ultimately become
15 administratively insolvent where it was handed to a Chapter 7
16 Trustee and said here make something out of this. I feel that
17 I'm in that position now.

18 But as I said, I'm not going to belabor the record.
19 You all were present when Your Honor created this reserve
20 account, and as I said, I think that any interest that Mr.
21 Benun may have had in that account is the property of this
22 Chapter 7 estate to the extent that it's not going to remain
23 property of the Jazz Photo estate. It should be paid to Mr.
24 Forman as the Chapter 7 Trustee for Jack Benun.

25 THE COURT: But to the extent -- and your point is
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1 well taken about -- you didn't quite state it, but the tie in.
2 But to the extent that business side case has no relief stand
3 of the burden on the personal side case, whether the dollars
4 are in one way or the other assuming that there are some -- the
5 dollars that you're talking about in -- for administration
6 purposes on the 7 side, it doesn't make too much difference. I
7 mean there's Fuji with the largest part of the unsecured claim,
8 and whether paid on the corporate side or the personal side
9 would seem to be of little moment as a general matter.

10 It's true that I'm not unsympathetic to the Benun
11 counsel in this case -- in the Jazz case, that he sort of came
12 out on the short end of the lottery. Everyone took a chance,
13 and it was recognized. Mr. Sirota said time and again, Mr.
14 Greenberg said time and again, if there isn't a substantial
15 amount of money that comes out of Imation and/or a reversal and
16 it wasn't in the Federal Circuit, that the risk takers were on
17 this side of the room.

18 Now it seems to have worked out for them, and Mr.
19 Schwartz, you know -- and I don't say this with an edge. I say
20 it quite sympathetically. His firm is on the short end of it,
21 because there wasn't the conversion. There wasn't the
22 appointment of a Chapter 11 Trustee, and so there it is. Now
23 if you develop out of the sale of the house and other assets
24 the dollars for administration, it would seem to make no
25 difference at an administrative level. And so it's -- in a

1 sense it's an argument against at least the administrative
2 necessity of that money to go into the personal case instead of
3 the business case.

4 Having said that, that's probably not the standard
5 that should be applied. It's what was the intention, and
6 whether payment of the dollars either as Mr. Schwartz would
7 have it go directly or as you would have it go into the 7
8 estate, was intended under circumstances like this. Well, of
9 course, the circumstances have changed from that July 30th date
10 both plus and minus. If you look carefully at the transcript,
11 there are several and/ors, and the and/ors go to successful
12 Imation and/or successful Federal Circuit appeal or the
13 negative side of those and/ors, and now we can debate what is
14 success. Well, it's clear that the Federal Circuit was a
15 failure from the appeal point of view, and the \$25 million in
16 essence was cheapened over the period of the case for several
17 reasons. It cost more and more and more to get there, and on
18 the other side more and more liabilities or potential
19 liabilities developed not the least of which is what came out
20 of the National Trade Commission, and, as I said before,
21 piggybacked by Fuji with respect to their potential
22 administration claim. So the picture got better and worse, and
23 I'll give Mr. Schwartz one last crack at a response, and then
24 I'll decide. Thank you, Mr. Holt. Mr. Greenberg, I don't mean
25 to leave you out. I don't know if you're --

1 MR. GREENBERG: I was going to echo some of the
2 comments of Mr. Sirota if the Court wants to hear me on the
3 record briefly but --

4 MR. SCHWARTZ: I think that's the first time that
5 Howard only said five or six words in a court hearing. Your
6 Honor, I guess, first of all, Your Honor just talked about the
7 fact that the Imation settlement, because it took so long, it
8 cheapened that settlement, because it cost more to get to it,
9 and the costs increased in the process. And that, Your Honor,
10 was not due to Mr. Benun's efforts or lack thereof. We would
11 like to have gotten to a trial in the Imation case a long time
12 ago.

13 THE COURT: But here. We had an entire
14 administration of a complex case where Mr. Benun rode a lot of
15 the benefit besides getting 75 hundred dollars a week. There
16 was a Federal Circuit appeal, which if successful, would've
17 gotten him off the hook on a \$30 million personal judgment.
18 That's worth something. Of course, now without the win, it all
19 turns to ashes, but he rode the benefit of that, and at least
20 arguably he got whatever benefit will flow through to Fuji in
21 satisfying -- it's really a partial satisfaction, and if it's
22 20 percent or whatever, it's -- it partially satisfies a
23 personal judgment against him. So he benefitted from the
24 Chapter 11, and we can debate -- Fuji obviously feels that Mr.
25 Benun's presence was a huge negative. If the infringement

1 post-petition and to some extent pre-petition beyond Judge
2 Hochberg's judgment in that period after August whatever 2001
3 holds, that's a very substantial negative all the way around to
4 everybody on this side of the case not to mention for Mr. Benun
5 personally.

6 So what do you do with all of this? My assessment is
7 that the changes in the period since July 30th when -- whatever
8 year that was when the reserve was established --

9 MR. SCHWARTZ: Two thousand three.

10 THE COURT: What was it?

11 MR. SCHWARTZ: Two thousand three.

12 THE COURT: Two thousand three. Thanks -- is that we
13 have something that is not as absolutely bleak as it could've
14 been. There could've been zero dollars, a huge negative,
15 because you had this \$25 million, but it's still not I use the
16 term rosey, and I don't have much difficulty with the notion
17 that the intention with respect to the use of those funds was
18 for the benefit of creditors in the corporate case and not, you
19 know, something for Mr. Benun unless it really turned out well,
20 and it hasn't turned out well. I don't see this as a great
21 result. It's better than, you know, abject failure all the way
22 around and minus \$25 million, but it's not a great result. But
23 I'll hear you.

24 MR. SCHWARTZ: Obviously, I can, Your Honor, debate
25 you, but I'm debating you on what Your Honor's intent was back

1 on July 30th of 2003, and if your intent was that if we get a
2 rosey picture, then Mr. Benun can apply, then I think Your
3 Honor would've said that then, but Your Honor used the terms
4 burial fund, Trustee expenses, administrative insolvency,
5 things like that, and certainly, that's not what happened. And
6 so it's my reading of that transcript -- again, I can't get
7 into your head.

8 It's my reading of the transcript that it was only
9 where there was administrative insolvency, it was only where the
10 case went down the tubes and burial fund -- the case was going
11 to be buried. There was going to be a Trustee appointed,
12 administrative insolvency. Only under those circumstances
13 would that burial fund be used to pay Jazz creditors, which
14 would be administrative creditors, otherwise, I think Your
15 Honor intended was that Mr. Benun can apply and the
16 professionals in the Benun case would then get compensated, and
17 I think that's a fair reading of Your Honor's intent on July
18 30th, 2003. I don't think that rosey or things like that ever
19 came into the picture. And that's my last comment. I thin
20 that's a fair reading of the transcript.

21 THE COURT: All right. I read the transcript several
22 times. What I -- anybody else have any comment?

23 (No verbal response)

24 THE COURT: All right. I appreciate the argument on
25 -- in every corner, and in putting myself back into those more

1 uncertain times of 2003 when the reserve was established, there
2 never was an assurance that Mr. Benun was going to get that
3 money. Frankly, I don't think Mr. Benun personally deserves
4 that money under any circumstances, and it seems to me that
5 that's not a conclusion, by the way, that I reached with
6 respect to Benun's counsel. That's a very different issue.
7 Ms. Jurow, I didn't mean to cut you out.

8 MS. JUROW: I have no position.

9 THE COURT: All right. The -- I don't think it was
10 just administrative insolvency, though clearly Mr. Schwartz is
11 correct that was the primary point, because that's the starkest
12 danger at a point in time when nobody knows whether the Federal
13 Circuit is going to reverse or not or whether Imation is going
14 to be worth a plug nickel or simply be a cost. But it's not
15 the only concern, and here we do have a runup in both claims of
16 every stripe and including professional expenses since July
17 30th of 2003. It's more than just footnote value.

18 Mr. Holt fairly -- and I appreciate it -- points out
19 that it looks like administration on the Benun side will be
20 accounted for with real dollars. There's no guarantee, but it
21 looks like that will happen, and so this decision today may be
22 really of not much moment one way or the other, but my
23 conclusion is that this is only a modest distribution in
24 anticipation for the general unsecured creditors that the
25 intended and best use of the reserve funds is to keep them in

1 the Jazz case, and I'm going to deny this motion for those
2 reasons.

3 MR. BUECHLER: Is that with prejudice to preclude
4 them bringing the motion in another six months or a year or --

5 THE COURT: No, that's the conclusion, that it's not
6 for their purpose. Yes, it wasn't -- that's the end of the
7 road as far as this Court is concerned. That that's an asset
8 in the case -- in the Jazz case and is not available to Mr.
9 Benun or Mr. Benun's trustee or Mr. Benun's professionals. So
10 818 is denied. Mr. Sirota, if you would just submit a short
11 form of order on that. Just clean up the record.

12 We now have the application of Budd Lerner to be
13 special litigation counsel, as I understand it, with respect to
14 two matters.

15 MR. SIROTA: Yes, Judge, and perhaps my use of
16 expanding the retention wasn't the best word to use, especially
17 with a final fee app pending next week. But in any event, we
18 seek to retain Budd Lerner to handle the appeal of ITC-2 to the
19 Federal Circuit. The rationale there is simple. We have a \$13
20 million plus penalty assessed in that case, and Fuji has
21 indicated in papers filed with this court that it seeks to rely
22 on that ruling as part of its admin claim. The administrative
23 claim bar date is April 25th, Judge, and we haven't seen the
24 final product from Fuji, but certainly in their motion the ITC-
25 2 ruling was cited extensively.

1 We don't believe that Fuji can simply take the ITC
2 ruling, wave it in this court, have it adopted just like they
3 couldn't wave it before Judge Hochberg in ITC-1 and had to move
4 forward and prove under the appropriate burden of proof their
5 entitlement, if any. It's a very substantial issue both from
6 the ITC perspective, and it's a substantial monetary issue from
7 Fuji's perspective, and, therefore, Budd Larner has agreed to
8 handle the appeal at a flat fee of \$70,000, and we ask that
9 their retention be approved. We think it's money well spent
10 given the dollars at issue.

11 The second component for their retention involves the
12 handling of malpractice actions stemming from the case before
13 Judge Hochberg. This may come as somewhat new information to
14 the Court, but it's certainly not new information to Mr.
15 Greenberg and counsel to the Committee. We described early on
16 in this case the potential for filing the action. We didn't
17 want to have Budd Larner distracted by commencing this action
18 while it had Imation under way and, therefore, reserved moving
19 for their retention at that time. Budd Larner, as set forth in
20 the affidavit of Mr. Frazza, has agreed to accept the case on a
21 33 and a third contingency but for a \$30,000 payment for
22 expenses, and we think likewise that's money well spent.

23 Fuji's argument that it's premature we would submit
24 to the Court should not be sustained in this regard. Mr.
25 Kaplan has filed a notice of appeal in the ITC-2 matter. As

1 Your Honor can appreciate, he has no desire to remain as
2 counsel of record before the Federal Circuit if he's going to
3 be replaced by Budd Lerner. And secondarily, I'm not
4 intimately familiar with the briefing schedule, but I know Budd
5 Lerner is anxious to get underway in reviewing all the
6 documents that need to be reviewed for ITC-2, the appeal, as
7 well as getting underway with the malpractice actions. I
8 believe it has a six-year statute, and I don't know the date
9 that it expires. I don't believe we're in immediate harm's
10 way, but more importantly, Judge, we've run this retention by
11 Mr. Moore who, as far as I know, everybody's consented to
12 subject to Court approval as the liquidating Trustee as part of
13 the ultimate liquidating plan. So if he's on line with the
14 terms of engagement, we felt it appropriate rather than wait
15 until he's formally knighted that we move forward today.

16 THE COURT: Any opposition?

17 MR. SCHWARTZ: Your Honor, sorry to interrupt. May I
18 be excused?

19 THE COURT: Oh, yes, sure.

20 MR. SCHWARTZ: Thank you very much.

21 MR. ROSENTHAL: Your Honor, some 22 months ago we
22 came into this courtroom, and we heard the representation of
23 numerous professionals including Budd Lerner, Mr. Kaplan, Mr.
24 Sirota, about how the ITC will rule in favor of Jazz, how the
25 -- Judge Hochberg got it all wrong, and the Federal Circuit

1 would reverse, and here we have the same professionals who were
2 wrong 100 percent of the time on the patent side telling Your
3 Honor that it would be a great thing for this estate to extend
4 any dollars on appealing from the ITC decision.

5 Now, I'm not sure if they're familiar, but these are
6 essentially factual determinations. The test for reversal on
7 appeal is substantial evidence, worse than the jury trial, or
8 proven at the jury trial, worse than the reversal of the judge.
9 So I personally -- and I don't want to -- that's not what I'm
10 here for is to plead, but I think that this is just a
11 boondoggle that the delays forever the settling of this estate,
12 because the Federal Circuit has a track record of taking two
13 years. This estate is going to go on to the benefit of
14 professionals for two years until the Federal Circuit settles
15 out, because Fuji's administrative claim will prevent the
16 settlement of this case.

17 We've come to Your Honor and we've asked Your Honor
18 to set the amount of our administrative claim, and contrary to
19 what we just heard, we do not have the burden in this case.
20 The burden is on the estate to prove that they did not -- that
21 they permissibly repaired. In the normal infringement
22 situation we would have the burden, but this is that oddball
23 situation where all the cameras are covered by Fuji's patents.
24 The issue is is there an affirmative defense. This is not your
25 normal case.

1 Unlike Judge Hochberg where we did have a burden on
2 one hand, but again the burden shifted to the respondent, and
3 the Judge felt -- in that case the defendants -- the Judge felt
4 that they hadn't met the burden. So from Fuji's perspective on
5 the -- on what we're facing here, the retention of Budd Lerner
6 for \$70,000 sounds like a bloody bargain but at whose expense?
7 How many hundreds of thousands of dollars of other
8 administrative expenses will be expended in the next two years
9 while we wait for what the Federal Circuit has to say? So that
10 -- so my pitch, if you will, Your Honor, is that what this
11 issue needs is fresh eyes. I think that when we do have a
12 liquidating Trustee and when the liquidating Trustee is hired,
13 fresh counsel, and somebody looks at it, and Your Honor looks
14 at it, I'm not sure that it's such a bargain to the estate.

15 On the issue of the malpractice insurance --
16 malpractice claim, I have no brief for the counsel on the other
17 side in the District Court, but on the other hand, I never hear
18 the name of the attorney who's going to be sued, and I must
19 confess that I find it difficult to distinguish between the
20 firm who represented Jazz principally who was on the Creditors
21 Committee as opposed to Mr. Kaplan who was co-counsel or as
22 opposed to Skadden Arps who was counsel for Mr. Benun but
23 participated actively in the entire defense, or, to continue
24 on, Mr. Kaplan in the ITC, because the results are the same.
25 You know, one is 99 percent and one is 93.5 percent. I find it

1 hard to distinguish.

2 So again I hear -- it sounds terrific. Thirty
3 thousand dollars. We can keep this estate going for another
4 ten years fighting a malpractice suit, but I think that again
5 this is a case where there should be fresh eyes. Somebody
6 should look at this who's not in this room today, who is fresh
7 to the case, who is going to decide one way or the other. If
8 the result is we're going to fight the appeal, I'm more than
9 ready willing and able to fight the appeal. If a decision is
10 made to fight the malpractice suit, I may be a witness. I
11 don't know. But I don't -- my only brief on both of those
12 issues is what is the consequence to the administrative expense
13 of this estate? Are we going to have an estate out there three
14 years from now with lawyers and accountants and liquidators and
15 whatever?

16 So my pitch, Your Honor, is purely that somebody
17 should look at this issue who has not been a party to what is
18 unequivocally a failed case. I don't see how anybody can
19 justify calling this other than a failed case. Your Honor, the
20 \$25 million has largely triggered away by -- I think but for
21 Fuji's million, I'm not sure how much will be left for the
22 unsecured creditors. The administrative expenses in this case
23 have been extraordinary -- \$10 million dollars in legal fees
24 alone -- legal and professional fees alone. So with that in
25 mind, perhaps it's less a legal appeal than an equitable

1 appeal, but --

2 THE COURT: Well to the extent that this had the
3 color of a two-party dispute throughout, because the general
4 unsecured creditors were only a relatively small -- six and a
5 half million dollars or some such --

6 MR. GREENBERG: We think that's what it's going to
7 shrink down to, between six and a half and seven and a half,
8 Your Honor.

9 THE COURT: It played out as a battle between two
10 parties, and, you know, however it came out and whatever it
11 cost, there's no much after the fact that can be done about it.
12 But right now at this moment you raise a legitimate point, and
13 let's take the longest lead time item as I would project if it
14 were approved first, and that's the malpractice case. Mr.
15 Sirota, let me just ask you, if I may. We'll get to others.

16 My recollection -- I did hear about the malpractice
17 case for the first time last time, and you -- I think the
18 indication was -- and I think it's related to the disclosure
19 statement now -- that that would be an asset that would be
20 turned over in what you would hope is post-confirmation
21 liquidation and would not hold the case open. Am I correct?

22 MR. SIROTA: Judge, you're absolutely correct.
23 Neither the appeal nor the malpractice case have any impact on
24 the distribution of the \$25 million or hold confirmation up one
25 day.

1 THE COURT: Okay, so let's -- but let's just stay
2 with the malpractice case, because that would be a potential
3 asset funded to the extent of the \$30,000, contingent fee
4 running forward, regardless who counsel is, and whatever comes
5 out of it comes out of it and goes to the unsecured creditors
6 through the post-confirmation process. Is that right?

7 MR. SIROTA: Exactly right.

8 THE COURT: Now, if we step back, so, Mr. Rosenthal,
9 I don't think that that would hold up the case. Now Mr.
10 Buechler seems to feel otherwise. Is that --

11 MR. BUECHLER: Yes, Your Honor. Let me explain why.
12 Because while you arguably can close the administration of the
13 Chapter 11, which is where Your Honor is going with an order
14 under Section 350 of the Code, the administration of the
15 liquidating trust will close -- just one example. Until the
16 Federal Circuit appeal is resolved --

17 THE COURT: Oh, no, I don't want to deal with that
18 yet. I'll deal with that separate.

19 MR. BUECHLER: But until you resolve Fuji's
20 administrative claim and what Fuji gets, you can't figure out
21 what unsecureds are going to get, what piece they get from our
22 percentage, and that keeps the administration -- the case,
23 whether it's open for a year --

24 THE COURT: I was going to go to the federal appeal.
25 I think that's a different issue than the malpractice case.

1 But the malpractice, I mean it's sort of ordinary fare to pass
2 along litigation to the liquidating Trustee post-confirmation
3 and have the chips fall where they fall.

4 MR. BUECHLER: Well for selective eyes, as Mr.
5 Rosenthal tried to articulate, was if they're pick and attack
6 the Dryer firm -- and there should be fresh eyes, because if
7 the Dryer firm arguably engaged in malpractice in the defense
8 of the litigation before Judge Hochberg in the District Court,
9 then maybe so too did Mr. Kaplan, who was co-counsel for the
10 debtor, and that should be pursued for the estate, and maybe so
11 too should others. And our point is it seems to be a little
12 selective and again may have delay factors. And when you look
13 at what you could potentially recover from that --

14 THE COURT: Delay factors in terms of what?

15 MR. BUECHLER: Well, again, when you look at what may
16 be potentially recovered from that lawsuit to the cost to keep
17 the administration, whether it's totally before this Court or
18 just having the trust operating after this case, formally
19 before Your Honor and this building is closed, but the trust
20 administration may go on. How does that balance for the net
21 recovery to creditors? We're concerned that the net recovery
22 won't be positive. That's our issue on that.

23 THE COURT: All right.

24 MR. SIROTA: Let me just answer some factual
25 questions. Number one, the Dryer firm is clearly in harm's

1 way. Mr. Kaplan's firm is being reviewed by Budd Lerner as a
2 potential defendant, and the we have had discussions with Mr.
3 Holt as well as with the Riker firm on the issue of Skadden who
4 represented Mr. Benun. There's been complete discussion as to
5 those who may be in harm's way potentially on a malpractice
6 cause of action, but it's for Budd Lerner to evaluate, to
7 review, and to prosecute. Clearly, the Dryer firm is there.

8 I don't understand in light of the negotiations over
9 the liquidating trust agreement and the disclosure statement
10 and the selection of Mr. Moore why he is suddenly being
11 questioned, because he endorses this retention, and is it
12 Fuji's position that as Mr. Moore makes decisions as
13 liquidating Trustee that he's going to be subject to constant
14 review on those decisions? It was vetted with him. There's no
15 hold up in closing or distributing dollars, and when Your Honor
16 gets to the issue of the federal appeal, I'll address that as
17 well.

18 THE COURT: How about the federal appeal?

19 MR. SIROTA: We initially thought it made the most
20 sense to try to resolve Fuji's administrative claim as part of
21 this case and avoid the middleman, namely, the appeal of ITC-2,
22 but unfortunately, those discussions were not fruitful.

23 THE COURT: I assumed that was the case.

24 MR. SIROTA: As a result, we're stuck in this
25 position where Fuji is waiving the ITC-2 ruling as the basis

1 for Your Honor to approve their admin claim, and we don't
2 believe the ITC ruling should be used for that purpose. That
3 Fuji has to prove its admin claim as it did in the District
4 Court before this Court or before the District Court, but it
5 can't use ITC-2 as that proof. But even if we could resolve
6 the Fuji component of the issue, we still have lingering a \$13
7 million penalty, and while I've had discussions with Mr.
8 LaBruno in reserving rights in the disclosure statement and
9 don't know whether they're going to articulate an
10 administrative claim, they've certainly articulated an
11 unsecured claim for \$13 million, and contrary to Mr.
12 Rosenthal's --

13 THE COURT: Their position is they're subordinated.

14 MR. SIROTA: That is my position, and Mr. LaBruno has
15 not acknowledged that position. We put the appropriate
16 disclosures in the disclosure statement to reserve the ITC's
17 rights, and we'll find out in the very near future whether we
18 can come to an agreement. But we can't have the ITC-2 ruling
19 out there without challenge given its implications on this
20 estate on two levels. And, Judge, contrary to Mr. Rosenthal,
21 the ITC's record when being reviewed is not perfect, and he's
22 right, the professionals felt that there should be a reversal
23 at the Federal Circuit. There was not a reversal. That
24 doesn't mean this estate should play dead and allow what could
25 be \$20 million of claims to come in over an expenditure of

1 \$70,000 to make sure those issues are fully challenged,
2 briefed, and argued.

3 THE COURT: Let me hear from whomever on the Fuji
4 side wants to talk about the Federal Circuit only.

5 MR. SIROTA: Judge, I'm sorry. One more point on the
6 Federal Circuit appeal. To bring in fresh eyes as opposed to
7 the Budd Larner firm that's familiar with the record doesn't
8 seem to be economical, and I don't believe we would be able to
9 strike the economic deal. But I also don't hear Mr. Rosenthal
10 saying that there should be fresh eyes on both sides.

11 MR. ROSENTHAL: Well to answer the last point, there
12 haven't been fresh eyes. Fuji sat here and listened for 22
13 months to counsel on that side of the room tell us repeatedly
14 that everything we said were wrong, and we sat there and said
15 we don't agree. But unlike some counsel on the other side, we
16 never stood here and said we guarantee the result. We just
17 write is the only way I can define it.

18 But let me just -- you know, we put our money
19 forward, and we fought these fights, and we were correct. But
20 the bodies that held in our favor held after a heavily
21 adjudicated result. Now let me just talk about what a Federal
22 Circuit review of the ITC may or may not entail. The Court has
23 not as yet set a briefing schedule. The Court had ordered
24 three months ago that when it dismissed the first appeal on
25 Jazz's side and Benun's side that when the ITC decision -- when

1 the decision on remedies is made, then counsel for Costantino,
2 for Benun, and for Jazz should make a motion to our court to
3 consolidate all the appeals, and then we'll set a schedule.
4 That, of course, hasn't happened, so right now we're sort of in
5 a limbo in terms of administration.

6 But I've been listening for all these many months --
7 maybe years almost -- that it doesn't matter -- well, actually
8 when we started the ITC was a great idea. They would
9 adjudicate the result, and we'd all know what the answer was.
10 That was how we got into the ITC in the first place. When the
11 ITC didn't rule in Jazz's behalf, then we're told, well, the
12 ITC is just an administrative body. Who are they? What do
13 they know?

14 Well, I'm not sure that a appellate review or an
15 administrative body decision is anymore valuable than the
16 appellate body decision if that's the position that one's going
17 to take. We I think properly put in front of Your Honor that
18 it's -- it is maybe your job to make the determination as to
19 what the amount of the administrative claim, if any, is to hear
20 the evidence, and obviously, the result in the ITC is very
21 persuasive. But I guess Your Honor has the right to ignore it,
22 although we disagree with that -- with such a result.

23 THE COURT: Well, I don't want to ignore it, and, you
24 know, I don't want to arrogate to myself a field and a specific
25 case that has been poured over and decided by an expert

1 administrative body. On the other hand, the \$70,000 -- and
2 we'll have to talk about the time -- the extender. My
3 recollection is it was May 8th to January 15, 20, 23, something
4 like that, from argument date to decision on this last appeal.
5 So whatever that is, eight months, eight and a half months.
6 And we'll have to talk about that. I'm obviously pressing two
7 closed matters out to the extent they can be closed out, but
8 for \$70,000 given the weight of the claims on the other side,
9 both Fuji's claims pre- and post-petition and the claim -- the
10 penalty claim, if I could use that term, for the ITC, and the
11 fact that there does appear to be a gray zone in all of this.

12 Now, you're right that you were right to the extent
13 the decision makers have weighed in, but -- and it's always of
14 question of when and who has the last word. When is it, and
15 who has it? Well here maybe it would be appropriate for the
16 Federal Circuit to look one more time, and maybe they'd look
17 more quickly, at what the ITC has viewed in the reduts of the
18 Jazz processes. Now having said that, obviously, this Court
19 operates on the quick lines of settlement, and here we have a
20 lot of tactical stuff both on Fuji's side and the debtor's
21 side, and should I favor one side or the other in the
22 negotiation and with the tactics, because it's obviously bound
23 up in that same set of considerations, but I must say it's a
24 bargain rate.

25 Yes, Budd Larner made certain light -- I don't think
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1 they made quite the guarantees that you stated, but they did
2 make some light offerings of a positive nature on the appeal.
3 I recall it distinctly. I don't quite recall it as guarantees.
4 And it didn't turn out that way. But I must say I've made
5 predictions like that myself, and I've been wrong more than
6 I've been right, so it's just the nature of it.

7 Now I can't say whether the Federal Circuit was a
8 slam dunk for your side or whether it was debated in the
9 processes of the Federal Circuit or what. And I don't know
10 what the next appeal would bring, but it does seem to me to be
11 just not appropriate for me to hear again -- which is what you
12 want me to do -- why the Federal -- I'm sorry -- why the ITC in
13 this too is wrong or right when the experts are there, and the
14 process in place, and the amount of money is defined, and it's
15 not significant. And so now it's just how long will it take.
16 That does make me uncomfortable, but to the extent that that
17 process can be rushed, if at all, by the motion that you say
18 which hasn't been made to consolidate the cases on appeal and
19 otherwise beg the Federal Circuit to hear it quickly, that
20 would be the best resolution.

21 MR. ROSENTHAL: Well, Your Honor, just to remind you,
22 it wasn't eight months. It was 20 months.

23 THE COURT: Am I in the wrong year.

24 MR. ROSENTHAL: You're in the wrong year, Your Honor.
25 I'm sorry.

1 THE COURT: From the argument?

2 MR. ROSENTHAL: No, not from the argument.

3 THE COURT: No, I -- no, I said just from the
4 argument.

5 MR. ROSENTHAL: No, from the filing of the appeal --

6 THE COURT: No. No. I know it was 20 months, but I
7 remember distinctly that it was a May 4 -- a argument in '04,
8 and it was a January -- whether it was 12 or 15 or 20 --
9 decision in '05. And so that's a defined period. I can't
10 recall. I know that it was a long time from the briefing
11 schedule. It was forever. But if one could get -- this isn't
12 the first time it's up. They're going to say, "Oh, no, this
13 case again?" You could imagine what they're going to say.
14 "Let's get rid of it quickly."

15 MR. ROSENTHAL: It's in the first paragraph of the
16 last decision --

17 THE COURT: Yes.

18 MR. ROSENTHAL: -- where they said, "You guys back
19 again?"

20 THE COURT: Yes, and now they're going to go, "Get
21 rid of it." But it does seem that I would be arrogating to
22 myself -- one way to view it -- or taking on all of these
23 arguments, because they're going to have to get up and say --
24 the debtor's going to have to get up and say the ITC was wrong
25 here, here, and here. You're going to have to get up and say,

1 well, the ITC has to be deferred to by this court, and where
2 are we?

3 MR. ROSENTHAL: Well, Your Honor, I would like to --

4 THE COURT: Let the Federal Circuit decide it.

5 MR. ROSENTHAL: Well, I would like to just make the
6 point about the consequence of that approach.

7 THE COURT: All right.

8 MR. ROSENTHAL: The reality is the liquidator can't
9 liquidate the estates, because --

10 THE COURT: That's Mr. Buechler's point.

11 MR. ROSENTHAL: Yes, and it is a reality because of
12 the size of the administrative claim and assuming that the ITC
13 makes an admin claim, which is not irrational to expect now
14 that they've discovered that Mr. Sirota thinks their claim
15 should be erased completely. There's a lot of money which
16 can't be disbursed expect to professionals. Professionals seem
17 to get paid as quickly as we can, and my concern, having been
18 here for 22 months, is that time is the enemy of any pile of
19 money in this court.

20 THE COURT: Well, you're right to the extent that I
21 am concerned about the time and -- but there -- it's not a --
22 though not the history of this cases, but in many cases it
23 isn't this way or that way. This thing could settle. It could
24 settle among the ITC on its claim, Fuji on those elements of
25 its claim pre- and post-petition. The debtor could give, Fuji

1 could give, ITC could give. Now it may not be in the character
2 of the parties overall, and so if that's the case, that's the
3 case. But --

4 MR. ROSENTHAL: But there is a wild card, Your Honor,
5 and that is there is a third respondent, Mr. Costantino, who
6 is --

7 THE COURT: He's got 130 or 150 thousand --

8 MR. ROSENTHAL: A hundred -- something like that, and
9 so it's going to be very hard to get -- he's taken his own
10 appeal with new counsel, so it's very hard to resolve this case
11 in his presence.

12 THE COURT: Oh, I don't think it's so hard. Mr.
13 Costantino will -- if people would come together and view him
14 in a certain way, it seems to me that he could be taken out of
15 this case one way or another. But having said, I'm not
16 bargaining on his behalf, although maybe I should, because
17 nobody here seems to representing him. And what was it, 130 or
18 150 thousand dollars?

19 MR. SIROTA: I thought it was 147.

20 MR. ROSENTHAL: About 130 I think.

21 THE COURT: It wasn't 13 and a half million dollars.

22 MR. ROSENTHAL: No. No, not even --

23 THE COURT: So I think that that ought to wag this
24 entire dog. I think that -- I think it's Fuji and the debtor
25 and Mr. Benun can weigh in, and it either settles or it

1 doesn't, and if it doesn't --

2 MR. ROSENTHAL: Well, that is another issue, Your
3 Honor, and that is the Benun -- an appeal was filed on his
4 behalf by Mr. Kaplan, and nothing we do in this room can
5 eliminate the claim against Mr. Benun personally.

6 THE COURT: Mr. Holt has never been before the
7 Federal Circuit. He's dying to get himself in there to argue
8 in Washington, and that's about the best --

9 MR. SIROTA: Judge --

10 THE COURT: Yes?

11 MR. SIROTA: -- can I clarify --

12 THE COURT: Go ahead.

13 MR. SIROTA: -- one issue? And that is that Mr.
14 Rosenthal I think appropriately told Your Honor that you could
15 look to the ITC-2 and determine your administrative claim or
16 ignore it, and I know Your Honor's feeling in response to it.
17 My point is this. We did not look at the Federal Circuit
18 appeal as throwing a monkey wrench or delaying the ultimate
19 liquidation of this estate by the liquidating Trustee for the
20 reason that we don't believe the ruling before the ITC is
21 binding or critical in the determination of the administrative
22 claim, and I got the sense from Your Honor's questions and
23 points that Your Honor sees it differently. That Your Honor
24 sees the ITC ruling and reversal affirmance by the Federal
25 Circuit as dispositive of Fuji's admin claim.

1 THE COURT: No. No, not Fuji's.

2 MR. SIROTA: Okay.

3 THE COURT: No.

4 MR. SIROTA: The ITC.

5 THE COURT: Yes. No. No. No, Fuji may have a
6 different -- the character of Fuji's claim may be different,
7 but clearly if the ITC says Benun and Jazz did not infringe
8 under this revised process, that would impact on the Fuji
9 claim, and the opposite, if they say they did infringe, now as
10 to monetizing it, that's a whole different issue.

11 MR. ROSENTHAL: Your Honor, I think what I've just
12 heard is that at the end of however many months or years it
13 takes to get the Federal Circuit to rule on a case that they
14 don't want to see anyway we're going to be back here in front
15 of Your Honor to quantify, because whatever the ITC did in the
16 Federal Circuit after it doesn't count. I think that's what
17 Mr. Sirota just said.

18 MR. SIROTA: I think, Judge, that to the extent that
19 Fuji wants to prove its administrative claim, this appeal does
20 not mean to prevent them from doing that. There's two prongs
21 to it. One to protect against the argument that sometimes is
22 advanced by Fuji that it's res judicata and collateral
23 estoppel. That's one problem. The second problem is the \$13
24 million penalty from the ITC. I would be more than glad to
25 agree with Mr. Rosenthal and Fuji, God willing, to a complete

1 resolution, or if not that, some procedure that allows this
2 estate and the liquidating Trustee to make distributions much
3 sooner than later.

4 THE COURT: Okay, but let's stay on the -- what is to
5 be decided in resolving Fuji's administrative claim. My
6 assumption -- if I'm wrong, let me know now -- is that the
7 debtor will say there was no infringement. Dollars aside, how
8 much the damages were, there was no infringement. Now that's a
9 fundamental issue decided by the ITC and on appeal now to the
10 Federal Circuit. Do you want me to decide that independent of
11 what happens in that appeal or to deny the capacity to have
12 that appeal, because I won't allow Budd Lerner or anyone else
13 to go forward with the appeal on the debtor's behalf?

14 MR. ROSENTHAL: Your Honor, that's not my position.
15 My position is that, if I listened to Mr. Sirota correctly,
16 we're wasting our time, because the purpose of taking the
17 appeal is to resolve Fuji's claim, which is far above that of
18 the ITC if you try to break and administrative versus a non-
19 administrative --

20 THE COURT: I'm trying to take it by element. I'm
21 trying to separate liability from damages.

22 MR. ROSENTHAL: Fuji contends that -- and has always
23 contended in this Court that the debtor by agreeing to go to
24 the ITC to resolve these disputes is collaterally estopped by
25 the result in the ITC, but what I'm hearing now is --

1 THE COURT: Even if that's the case --

2 MR. ROSENTHAL: No, but what I'm hearing now, Your
3 Honor, is that's not the case in the view of the debtor or
4 whoever is going to represent the debtor three years from now
5 or two years from now when this is going to get resolved,
6 represents the Trustee, or whatever. No money can be disbursed
7 or very little money can be disbursed to the unsecured
8 creditors until Fuji's administrative claim is resolved,
9 because that represents such a big hunk of the money.

10 THE COURT: That may be the case.

11 MR. ROSENTHAL: Yes, so what --

12 THE COURT: That may be the case. I don't know for
13 sure, but it may be the case.

14 MR. ROSENTHAL: What I'm hearing now is that after we
15 go through the Federal Circuit process, then their position is
16 whatever the ITC did, that doesn't count. We're going to start
17 again on the liability issue. Putting aside the damages issue,
18 they're going to start again, and I think that that's my fear.
19 That we're going to go through the Federal Circuit. I for one
20 feel very comfortable with the Federal Circuit. I don't think
21 that there's any likelihood of success on the other side, but
22 that's another issue.

23 THE COURT: But I think we're way at the end of the
24 line. I'm not saying that you're misreading Mr. Sirota, and he
25 can speak for himself on that point. He did say that just as

1 with Judge Hochberg, the ITC isn't the last word, and the
2 District Court had to talk about the liability of Benun and
3 Jazz to Fuji. Likewise, it sounds like he wants me to take the
4 same position that I'm going to have to decide that regardless
5 of what happens in the process. But if the ITC says that there
6 was infringement, and if the Federal Circuit agrees, it would
7 be a pretty stiff bankruptcy judge who says I'm going to hear
8 that anew and decide -- and if I hear it anew, to hear it for
9 more than 15 minutes -- and decide that there was no
10 infringement. So I don't think that's a real issue, so I
11 wouldn't worry too much about that.

12 The question is how long will the appeal take, what
13 damage will it do to efficient and timely winding up of the
14 administration of this case, and I don't have a ready answer to
15 that, because that in part depends on the flexibility of the
16 parties involved. But it seems to me that the \$70,000 on the
17 appeal, no predications would be asked for -- guaranteed I'm
18 not going to ask, you know, is it 80 percent or 90 percent sure
19 that you're going to get a reversal, counsel. I'm not going to
20 ask that, but go ahead.

21 MR. ROSENTHAL: Can I at least get an agreement to
22 join in an application for expedited consideration on the part
23 of the Federal Circuit? Because I think it does have -- I have
24 to defer to Bankruptcy Court -- Bankruptcy counsel.

25 THE COURT: I don't think that that's an unfriendly
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1 request. Mr. Sirota, before we get to counsel, do you have any
2 problem with that?

3 MR. SIROTA: Absolutely not.

4 THE COURT: Anyone have any problem with that?
5 Counsel would handle the matter if, as, and when I should
6 approve.

7 UNIDENTIFIED ATTORNEY: I would certainly think so,
8 Judge.

9 THE COURT: I mean you're only being paid a fixed
10 amount. If you drag this out for five years --

11 UNIDENTIFIED ATTORNEY: Should resolve it tomorrow,
12 there would've no objection. But I think that if such an
13 application is appropriate, that there would be no reason not
14 to make it.

15 THE COURT: I think it should be done. I think the
16 appeal should be processed as quickly as is app and efficient,
17 and let's do it. All right? That's the best we can do. Mr.
18 Greenberg?

19 MR. GREENBERG: Very briefly, because I think Your
20 Honor touched on all the issues, but just for the record. I
21 think you were right in approaching the issues on a bifurcated
22 basis. With respect to the malpractice action, I don't think
23 it delays anything, and the reality is it may well get settled.
24 It may well be that a claim will be waived. There may be a
25 carrier who doesn't feel like litigating. So I think you're

1 right, that once we pay the \$30,000 at some later day we'll
2 just maybe have more money to be distributed to the unsecureds,
3 and we would hope that happens.

4 With respect to the Fuji claim, if they have an admin
5 claim, whatever that amount is, they're getting 100 cents on
6 the dollar unless it somehow exceeds the 20 some odd million,
7 and reality is if they have an allowed unsecured claim, they're
8 probably going to wind up getting close to 70 cents on the
9 dollar. So if there is a number -- I think that when we went
10 through the numbers last time, they're 30 or 40 million dollars
11 out of -- there's another six or seven to be added to that in
12 large part.

13 We assume that there are going to be some things that
14 may be subordinated. They already have I think Jazz Hong Kong
15 for \$9 million is subordinate. There may be issued with
16 respect to JCB and Mr. Benun if he does have claims. So the
17 reality is when people take a step back and see the difference
18 between payment on an admin claim and an unsecured claim from
19 the Fuji standpoint, it's not 100 percent difference. It's a
20 30 percent difference, and you factor in the delay and the cost
21 not just of people who are on a contingency but the ongoing
22 Chapter 11 or liquidating trust process. That may be a reason
23 for people to revisit a global settlement.

24 THE COURT: If you could those numbers, you know,
25 even in the roughest terms in a genial negotiation session,

1 maybe you can bring it about, but I'm not -- you know, at this
2 point it's not for me to be a part of.

3 MR. GREENBERG: And we've heard lots of numbers. I
4 think that Mr. Schwartz wasn't that far off the mark when he
5 said 20 percent. That's a little bit optimistic, but my view
6 is that it's probably 15. I think the allowed non-insider
7 claims are going to shake out pretty close to \$7 million, and
8 if you get the one million from Fuji and nothing else, you're
9 at 14/15 percent. And we think there will be some spillover
10 from these various different causes of action or sale of
11 assets, so hopefully it's going to be in excess of 15 percent.
12 Maybe not quite 20, but it's not a 2, 5, or 6 percent kind of
13 distribution.

14 I heard several times today about the \$10 million on
15 this side of the room in professional fees. I know ours are
16 under 500. I know Mr. Sirota's are. I don't know where the
17 other eight and a half million is, but, you know, I don't know
18 if they're going back to pre-filing expenses dealing with
19 Imation litigation, but to both Mr. Sirota and I, that \$10
20 million seems to be a far cry from what was awarded and paid in
21 the Chapter 11 itself. So when I heard that number so many
22 times --

23 THE COURT: Mr. Buechler wants to verify that number.

24 MR. BUECHLER: Your Honor, simply put, it's what the
25 debtor has accrued, and if you look in your February, 2005

1 monthly operation report to their statement of operations, they
2 show legal professional fees accrued -- that includes Budd
3 Lerner -- if \$8,738,230, and then the additional one million
4 125,000 dollars and change for the legal fee allocation. A
5 combination of those two together exceed \$10 million based upon
6 this debtor Jazz's February operating report. That's where we
7 get the number from.

8 THE COURT: It sounds like eight seven. And my
9 recollection, isn't the allocation simply inter-company?

10 MR. GREENBERG: It may be.

11 THE COURT: So that's the same number.

12 MR. GREENBERG: Right. Right.

13 MR. ROSENTHAL: No, Your Honor, it's not the same
14 number.

15 MR. BUECHLER: No, it's not the same number.

16 MR. ROSENTHAL: It's a subtraction from the
17 professional fee number.

18 THE COURT: Yes.

19 MR. ROSENTHAL: So you have to add the two to know
20 what the real professional fees were. But they were
21 compensated some way is not really the issue. Total
22 professional fees as of end of February were vast approaching
23 \$10 million, and by today --

24 THE COURT: Well, okay, but it's \$8.7 million of
25 distribution here, but if it's 10 million or 8.7, it's a lot of
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1 money, but that's the nature of this case. I don't know what
2 Fuji paid, but I would it's, you know, more than nickel, and --

3 MR. ROSENTHAL: It just didn't come out of the
4 estate, Your Honor.

5 THE COURT: You're right, and to add insult to
6 injury, those fees did come in largest part out of Fuji's
7 pocket.

8 MR. GREENBERG: Correct.

9 THE COURT: So everybody -- that's why I say it's a
10 two-party dispute in most significant part. There are others
11 who are involved, but it's the nature of a two-party dispute
12 where it's insoluble, and to a large extent now we have the
13 Federal Circuit and the ITC, and that may be now the Federal
14 Circuit again. They're going to resolve it.

15 MR. GREENBERG: That's why I was suggesting that
16 maybe now that Jazz has stopped operating and for the moment at
17 least in the vehicle of Jazz Mr. Benun is out of Fuji's hair.
18 There may be the ability to sit down and just talk about
19 numbers and get to a resolution. I don't think that could've
20 happened in February. Maybe it can happen in April or May.

21 THE COURT: Well, I --

22 MR. ROSENTHAL: Because now we're just talking who
23 gets the dollars.

24 THE COURT: I encourage it. As I encouraged the
25 speedy appeal, I would encourage this, and whatever I can do to

1 facilitate it, fine.

2 MR. GREENBERG: And another thing, as part of the
3 plan, you know that there's a penalty class which, you know,
4 Mr. LaBruno may want to take exception to. If it's a matter of
5 law it turns out whether that number is 13,675,000 or some
6 lesser number, that is subordinate to unsecured creditors,
7 which it may or may not. That certainly changes the dynamics
8 of our plan with respect to a large number that may not
9 effectively really have to be dealt with, and hopefully that's
10 something that's going to either be agreed upon or can be
11 brought on before Your Honor in relatively short time. So
12 that's -- I think there are a lot issues that can fall into
13 place in pretty short order, and we would hope --

14 THE COURT: Well, someone's going to have to get
15 active to make those issues fall into order, as you put it, and
16 maybe it's the Creditors Committee.

17 MR. GREENBERG: And obviously I've given some thought
18 to the different numbers, but I think as far as \$30,000 to
19 start the process with everything else on a contingency as to
20 malpractice actions or multiple actions with or without the
21 joinder by Mr. Forman on behalf of the Benun estate, that
22 certainly makes sense, and I think given the numbers that are
23 involved with respect to the ITC, there's no option or
24 alternative but to take the next step, especially when you're
25 not doing it on an hourly basis but basically you're committing

1 \$70,000, and that's your sole exposure. Thank you.

2 THE COURT: Anyone else want to be heard on the issue
3 of retention of counsel, that is Budd Larner, on two matters,
4 the legal malpractice case and the appeal from the ITC to the
5 Federal Circuit? Anything else?

6 (No verbal response)

7 THE COURT: All right. I've heard discourse. I
8 appreciate again what counsel have said, and I think that it is
9 a relatively modest investment. The greater concern is time
10 with the appeal. I don't think that the malpractice case will
11 slow this matter down in terms of administration. This Court
12 will approve the retention of Budd Larner in the bases set
13 forth in the application, and the order can be executed
14 electronically.

15 MR. ETKIN: Your Honor, just one question on that.
16 Given the discourse and the agreement of all sides with respect
17 to the request for expedited appeal, can the order include that
18 the parties have agreed to --

19 THE COURT: Well let's put it this way. In fairness
20 to counsel who may not be familiar -- may not, for example --
21 and I don't know -- as Mr. Rosenthal with the mechanism to join
22 the three appeals, merge the three, or otherwise expedite this,
23 we're all on the record. If there's a problem, if Fuji feels
24 that the matter is not being expedited, I'll entertain a
25 telephone conference on that issue. I don't think it should be

1 in the order. You're going to have to educate yourself as to
2 what it is that -- and speak to Mr. Rosenthal. You know, the
3 two of you really can agree.

4 MR. ETKIN: That's fair enough, Your Honor.

5 MR. SIROTA: Judge, I noticed in paragraph five of
6 the order -- and I'm sure Fuji would want this changed -- the
7 last sentence says, "The funds paid by Lerner are coming out of
8 the proceeds they were holding."

9 THE COURT: Yes.

10 MR. SIROTA: And the last sentence says, "The balance
11 of said funds after deducting 100,000 shall be remitted to the
12 debtor." I think that Fuji, consistent with other comments
13 I've received, would prefer it be remitted to debtor's counsel
14 held pending further order of the Bankruptcy Court.

15 MR. BUECHLER: No issue. If you want to revise it
16 and send it down to the Judge --

17 MR. SIROTA: I'll make the revision in this --

18 THE COURT: All right. Thanks.

19 MR. SIROTA: -- and make it electronically, Judge?

20 THE COURT: All right. Thanks. Order to be
21 submitted, Carol, instead of electronically entering that
22 order. All right?

23 MR. SIROTA: I think the last issue on today's fight
24 card is the approval of the disclosure statement and related
25 procedures. Per the approved Imation settlement, the debtor

1 was required to file a plan and disclosure statement by March
2 21st. We did. I believe a day or two prior the filing of the
3 disclosure statement and plan we provided it to interested
4 parties. We certainly provided it to Mr. Greenberg earlier, so
5 that he could review it with his constituents and sign up to
6 it.

7 Per the Court's order shortening time on March 22nd,
8 it was served. In accordance with Your Honor's order,
9 objections were due by April 8th, noon, and the disclosure
10 statement and plan before the Court reflects comments from
11 Fuji, Mr. LaBruno on behalf of the ITC, the Committee, and Mr.
12 Moore, who is the proposed liquidating Trustee. We circulated
13 numerous drafts and had several discussions. We attempted, and
14 I think successfully, adopted most of the comments to resolve
15 concerns of all parties. And on April 8th, Judge -- we
16 apologize for the delay, but we wanted to provide you with
17 black lined versions of the plan and disclosure statement as
18 well as the liquidating trust and proposed order, so Your Honor
19 hopefully had an opportunity to see the progress that was made.
20 And as I indicated, I'm pleased to report there are not
21 objections to the documents as submitted.

22 There are some dates that we need to complete. Mr.
23 Buechler had asked that we expedite the hearing from the 25th.
24 I noticed I believe that Your Honor holds hearings on the 10th
25 of May which seem to work with our schedule if it works with

1 the Court's, and then I can -- we can go through -- assuming
2 Your Honor is comfortable with the adequacy of the disclosure
3 statement and the procedures, we can work through some dates
4 that are hopefully convenient to everyone.

5 THE COURT: Does that give you enough time?

6 MR. SIROTA: My paralegal reprimanded me this morning
7 when she saw that I had this getting served on one day's
8 notice.

9 THE COURT: Yes.

10 MR. SIROTA: She asked for three days, and I told her
11 that I would beg the Court to accommodate her, and I think it
12 just gives us enough time.

13 THE COURT: Mr. Buechler?

14 MR. BUECHLER: Your Honor, from our perspective,
15 under 105 of the Code the Court can shorten the time period.
16 Let's keep in mind this is a case that does not have a large
17 creditor body, and people have been very active, but when you
18 look at the total number of creditors, it's maybe 40 or 50
19 people. We asked the Court to shorten it, because what we'd
20 like to do is to have the trust in place, because the effective
21 date is now the confirmation date. So that before we get to
22 the May 20 two-year statute of limitations period, the Trust is
23 in place and can formally commence the lawsuits that need to be
24 commenced prior that date. So we would encourage the Court to
25 hear confirmation on May 10th, and if need be, give Mr.

1 Sirota's office an extra day or two to just physically copy and
2 mail to, pursuant to the authority under 105 of the Code,
3 shorten the 25-day voting period by a couple of days, because
4 it is not a large creditor body.

5 MR. SIROTA: I don't on the May 10th date, Judge,
6 that you need to do that necessarily. I think we fixed the
7 voting deadline to the 6th of May, and we have three days to
8 mail out. I think we would just come in -- no? Did I
9 miscount?

10 MR. BUECHLER: I didn't count the days, but the Court
11 concluded -- and again --

12 THE COURT: Very tight.

13 MR. SIROTA: Very tight.

14 MR. BUECHLER: But we'd ask the Court, you know,
15 because that's our compelling reason is --

16 THE COURT: No, it's a -- I understand, and it's a
17 fair point. I'm not -- but again, does Friday, May 13th at
18 10:30 work? It gives you just a -- those couple more days?

19 MR. BUECHLER: We'd --

20 THE COURT: Go ahead.

21 MR. BUECHLER: Again, from our perspective, we'd ask
22 the Court to shorten the voting period. If you give people 20
23 days or 21/22 days to vote, it's not a -- you're not dealing
24 with a large creditor body. Those who have been active -- been
25 very active would rather give the liquidating agent, which will

1 be Mr. Moore, as agreed to by the parties, the extra couple of
2 days to get himself in position, formalize it, and have time
3 and not shorten the time period any further that he has to
4 commence causes of action all before the two-year period, and
5 that's our driving concern. That's why we asked, and Mr.
6 Sirota agreed on behalf of Jazz Photo, that we move the date up
7 to well before May 20.

8 THE COURT: Well --

9 MR. BUECHLER: We did the disclosure statement on
10 short notice --

11 THE COURT: I'm not resisting. Don't misunderstand
12 me. I'm not resisting moving it ahead of May 20, but count
13 days. If three days are needed to process what's going on
14 here, to do it one day I think is reckless. You're going to
15 make mistakes, and we're going to have a headache. Somebody's
16 going to get missed. Something's going to happen. So it's
17 basically the balance of this week --

18 MR. BUECHLER: But if we get it out by Thursday --

19 THE COURT: Okay. Fine. Tuesday, Wednesday,
20 Thursday, and -- so it's out by Thursday. It's in peoples'
21 hands any time from --

22 MR. BUECHLER: Saturday to Monday.

23 THE COURT: -- the 22nd through the 25th or 26th.
24 You've got then only 17 days in the hands --

25 MR. BUECHLER: I'm not --

1 THE COURT: -- of parties --

2 MR. BUECHLER: I'm not sure if it's that, because if
3 it's mailed on the 14th, everybody should have it realistically
4 by Monday the 18th.

5 THE COURT: Well, okay. Let's say the 18th if you
6 want to -- so you have -- so you have 12 days left in April,
7 and 13 days -- funny how it comes out to 25 days -- in May by
8 the 13th. And remember that when you read the rules, you're
9 not quite sure of what the objection period is. We're sort of
10 telescoping the objection period and the 25-day period.
11 There's a quirk in those rules. I don't see any problem with
12 the 13th and have the vote by your date, the 10th.

13 MR. BUECHLER: Yes, we'd like to see if we can have
14 the actual hearing on the 10th. Hopefully, Your Honor's
15 decision will agree with 105(e) of the Code, which would permit
16 the two hearings to have been combined to do a lot of other
17 things, could shorten the time period in which creditors have
18 to vote, but it's Your Honor's ultimate call.

19 THE COURT: All right. Let me hear from the neutral
20 voice.

21 MS. JUROW: Your Honor, I think we've -- we haven't
22 combined the disclosure statement, so that's past, and it was
23 -- there's not authority to do that. One 05 isn't a panacea to
24 do whatever we feel like because we're in a hurry. Now that
25 being said, I don't have any objection to us shortening time,

1 but -- Mr. Sirota's also been very efficient in the case but
2 still needs 60 some odd things to be copied, mailed out, sent,
3 and ballots to be tallied and come here and have a confirmation
4 hearing. And so what are we talking about now, the difference
5 between May 10th and May 13th? I don't understand this. I
6 really don't -- I don't understand what we're arguing about.

7 THE COURT: Yes, sir?

8 MR. ETKIN: Your Honor, it's just the difference
9 between giving the Trustee and whoever he retains as counsel a
10 adequate time to deal with that May 20th deadline, which is a
11 very serious deadline. So if that provides some explanation to
12 Ms. Jurow, you know, maybe that's helpful. Those three days
13 under those circumstances are probably three days that the
14 Trustee would be able to use. But again, it's Your Honor's
15 decision.

16 MS. JUROW: Judge, our office has worked with Mr.
17 Moore as an examiner and a trustee for many years. Mr. Moore I
18 thought did an incredible job expeditiously here in only five
19 days. I don't hear him here saying, oh -- you don't hear
20 anyone saying I need the --

21 THE COURT: It's not as though these issues can't be
22 reviewed in advance.

23 MS. JUROW: You can't even think about it. I mean I
24 have no reason to believe that Mr. Moore isn't thinking about
25 this as we all sit here. So I don't -- now I understand --\

1 THE COURT: That should be flagged, and any party in
2 interest can flag it to Mr. Moore. I'm going to set the 13th
3 at 10:30 for confirmation of Jazz. The votes would have to be
4 in by 4:00 p.m. on the 9th -- Monday, the 9th.

5 MR. BUECHLER: Any objection deadline?

6 THE COURT: Same date.

7 MS. JUROW: That's the objection date and vote?

8 THE COURT: And voting.

9 MR. SIROTA: And vote also the 9th at four.

10 MR. SIROTA: And, Judge, Your Honor has no objection
11 to us mailing this out within three days --

12 THE COURT: Three days.

13 MR. SIROTA: -- in paragraphs five, six, and seven?

14 THE COURT: Three days. So can we do this in hard
15 copy right now? Is there any other --

16 MR. SIROTA: I believe Your Honor has the clean order
17 that I faxed on Friday.

18 THE COURT: I do have it.

19 MR. SIROTA: Yes.

20 THE COURT: Let me just see where the blanks are, and
21 I'll fill them right in now.

22 MR. SIROTA: I guess the first thing, Judge, is the
23 first page. It's actually pages number two through 14.

24 THE COURT: Okay.

25 MR. SIROTA: And then going to page five, paragraphs
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1 five, six, and seven would be changed to within three days.

2 THE COURT: Well where's the language?

3 MR. SIROTA: Paragraph five, "within three business
4 days after the date hereof," on page five of the order.

5 (Pause)

6 THE COURT: Three. Within three.

7 MR. SIROTA: And the same would be true of paragraphs
8 six and seven.

9 THE COURT: Right.

10 MR. SIROTA: I believe then paragraph 14 is the
11 voting deadline.

12 THE COURT: Right. May 9th --

13 MR. SIROTA: Four p.m.

14 THE COURT: -- 4:00 p.m.

15 MR. SIROTA: And I believe the next blank should be
16 at paragraph 28, which is the confirmation hearing. The
17 objection deadline in the order is set for seven days before.

18 THE COURT: Yes, we'll have to change that.

19 MR. SIROTA: Yes. Paragraph 31.

20 MR. BUECHLER: It's the last clause of paragraph 31.

21 THE COURT: No later than May 9, 2005, 4:00 p.m. Any
22 other changes?

23 MR. SIROTA: I believe that's it.

24 THE COURT: All right. With these changes and seeing
25 no objection to the disclosure statement, is that true?

1 Calling last time for objections. This Court will approve the
2 disclosure statement for -- and issue the order which would
3 schedule confirmation on May 13th at 10:30. Thanks a lot.

4 MR. BUECHLER: Your Honor, one housekeeping item.

5 THE COURT: Yes.

6 MR. BUECHLER: On Thursday or Friday of last week Mr.
7 Sirota's firm sent by e-mail a proposed stipulation, an order
8 terminating a license agreement with BBH, Inc., the Bell and
9 Howell license agreement, under the five-day rule. Based on
10 discussions we've had with Mr. Sirota's office, Mr. Sirota, and
11 Mr. Traurig before this afternoon's hearing, we'd ask the Court
12 to hold issue of that order. We raised certain issues with Mr.
13 Sirota and Mr. Traurig this afternoon, and they're going to go
14 back and talk among themselves and talk to BBH as to our --
15 meaning Fuji's -- comments to see if we can resolve them. So
16 instead of us filing an objection, what we'd like to do is ask
17 Your Honor if you haven't signed the order, if you can hold it,
18 and then hopefully we can get back with a revised order in a
19 couple of days, or if we can't work it out, then we'll file an
20 objection at that point and ask the Court to schedule a
21 hearing.

22 THE COURT: Procedure work okay?

23 MR. SIROTA: That's perfect.

24 THE COURT: All right. So what's -- yes, what's on
25 the horizon? We have -- next Monday we have a series of

1 issues. We have the Budd Larner lien and fee issue.

2 UNIDENTIFIED ATTORNEY: The Budd Larner final, Judge,
3 together with interim fees and the motion to approve the sale
4 procedures.

5 THE COURT: The sale procedures.

6 MR. BUECHLER: We also have the motion by Rosenthal
7 and Rosenthal for direct payment of their alleged secured
8 claim. We asked Rosenthal with regard to backup, because their
9 motion is devoid of any calculation of numbers to support their
10 number. They responded in an e-mail that they would supply
11 that. I have on my list of people to call Ms. Singer today or
12 tomorrow, depending on what time I get back, to find out what
13 the status is, because I don't believe anybody has seen that,
14 and we all would like to see that, so all of us can pose any
15 comment as to whether any of us have an issue.

16 UNIDENTIFIED ATTORNEY: We've all made the same
17 request.

18 THE COURT: All right. Anything else from anyone?
19 Mr. Holt, welcome to the party.

20 MR. HOLT: Thank you, Judge.

21 THE COURT: Thank you, counsel.

22 ALL: Thank you, Your Honor.

23 * * * * *

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CERTIFICATION

I, PATRICIA C. REPKO, court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter to the best of my ability.

/s/ Patricia C. Repko
PATRICIA C. REPKO
J&J COURT TRANSCRIBERS, INC.

Date: April 14, 2005

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